

**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

<b>STATE OF DELAWARE,</b>	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: 1009004655
	)	
<b>STEPHEN J. DESMOND,</b>	)	
	)	
Defendant.	)	

Submitted: May 11, 2011  
Decided: July 13, 2011

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**OPINION ON DEFENDANT’S MOTION TO COMPEL**

Defendant Stephen J. Desmond (hereinafter, “Desmond”) moves pursuant to *Court of Common Pleas Criminal Rule 16(c)*, to compel the State to provide certain materials he claims he is entitled as a part of discovery. The State objects on the basis Desmond’s request is outside the scope of discovery as provided by *Rule 16*.

**Facts/Nature and Stage of Proceedings**

The motion is pre-trial; therefore, the facts are limited to those which are required from decision of this motion, and do not appear to be in dispute. Desmond

was arrested on September 5, 2010 by Delaware State Police and charged with the following motor vehicle violations; Driving While Under the Influence of Alcohol, in violation of 21 Del. C. § 4177(a); Failure to Remain in a Single Lane, in violation of 21 Del. C. § 4122(1); and Failure to Have Insurance Identification in Possession, in violation of 21 Del. C. § 2118(p)(1). Desmond entered a plea of not guilty by prior pleading on November 9, 2010 and waived trial by jury.

On November 11, 2010 defendant, pursuant to 10 Del. C. § 4332(a)(1) and 21 Del.C. § 4177(b)(4) filed a demand to require the presence at trial of the forensic toxicologist or forensic chemist and/or any other person in the chain of custody of any blood sample to be present to testify. On November 11, 2010, defendant filed a motion to suppress the blood and breath test on the basis that it was a search not supported by probable cause and as such is unreasonable and presumptively unlawful under the United States and Delaware Constitution. Defendant also filed a *motion in limine* to limit the officer's testimony regarding the field tests, specifically whether the defendant passed or failed the tests.

Case Review was conducted on December 15, 2010, the Order entered at that time indicates the State and Defendant disagreed regarding the materials which were subject to discovery and the defense would file a motion to bring the matter before the Court. On February 17, 2011, Desmond filed this motion to compel discovery. A hearing was held on the motion on May 11, 2011. Thereafter, the Court reserved decision.

During oral argument, Desmond indicated the motion to compel is now limited to four matters; (1) request for the in-car dashboard video and any procedures or policy governing the use thereof; (2) calibration and maintenance records of the gas chromatograph machine; (3) instructions for use of the blood kit used to collect his blood; and (4) the transportation protocol of the State Police for blood to the Delaware State Police Crime Laboratory. This is the Court's decision on the motion to compel. The motion to suppress and the *motion in limine* will be heard on the day of trial.

### Analysis

The *Court of Common Pleas Criminal Rule 16*, "Discovery and Inspection" provides in relevant part as follows:

- (a) Disclosure of Evidence by the State of Delaware
  - (1) Information subject to disclosure.
    - ...
    - (c) Documents and tangible objects -  
Upon request of a defendant, the State shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the State, and which are material to the preparation of the defendant's defense or are intended for use by the State as evidence-in-chief at the trial, or were obtained from or belong to the defendant.
    - (d) Reports of examination and tests -  
Upon request of a defendant, the State shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the State, and which are material to the preparation of the defense or

are intended for use by the State as evidence in chief at the trial.

In his motion to compel, Desmond alleged he requested of the State [Delaware State Police] standard operating procedures regarding the “use and retention of dashboard video recordings; use and retention of [Delaware State Police] Intoxilyzer room video recordings; calibration, maintenance and out-of-service records for the gas chromatograph; any instructions contained within the blood test kit used by the [Delaware State Police]; and procedures followed by the police agencies regarding the transportation of blood to the Delaware State Police Crime Laboratory.

The State has declined to produce the items essentially on the basis that Desmond has failed to meet threshold test of demonstrating that the requested documents are material and reasonable for his defense.

The rule requires the State shall permit the defendant to inspect and copy documents within its possession which are material to the preparation of the defendant’s defense. In *State v. Johnson*, 2001 WL 34083582 (Del. Super. 2001) the Court held:

“ . . . To satisfy the requirement of materiality, defendant must show some evidence that the requested pre-trial disclosure of the disputed evidence would enable him to alter the quantum of proof in his or her favor . . . too much should not be required in such a showing . . .

Thus, the rule requires some logical consequential connection between the material requested and the offense that the defendant stands charged. Further, the defendant must demonstrate that the request is reasonable.

The State's response to the Desmond request for the in-car dashboard video is that no such video exists. Therefore, as to this item, I fail to see how the defense can make a reasonable argument for an item which does not exist and as such, this request is denied.

The defense requested calibration and maintenance records for the gas chromatograph machine. The defendant is charged with Driving While Under the Influence of Alcohol where it is alleged that his blood was analyzed and found to have an alcohol content which violated the statute. The State relied upon the machine for the analysis of defendant's blood, thus the reliability of the machine is at issue. Surely, when and how the machine was calibrated is material to the defense and will go to the quantum of proof at trial. The State will have to establish at some level that the machine was functioning properly. The disclosure of the maintenance and calibration records documents goes to the reliability of the machine. The defense is permitted to put the accuracy and reliability to the test. If the defense is not permitted to have these materials, I do not see how they can make such a reasonable inquiry. Therefore, I find reasonable the request for maintenance and calibration records material necessary and reasonable and, as such, must be disclosed under *Rule 16*, and is granted.

The defense requests the instructions for the blood kit and the procedures protocol to transport the blood. The State is not required to provide a perfect chain of evidence, only that there is no reasonable probability of tampering. The issues raised in these demands are matters which are sufficiently raised at trial and need not

be disclosed pre-trial under the facts herein. Therefore, these two requests are denied.

So Ordered

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Alex J. Smalls

Desmond-OP July 2011